U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 28Sep2001

DATE:
CASE NO. 2001-INA-85

In the Matter of:

GENERAL ROOFING CO.
Employer

On Behalf of:

JOSE RAUL RODRIGUEZ
Alien

Appearance: Maria Marrero &/or Alberto Marrero
c/o Estamos Unidos Immigration Service
For the Employer

Certifying Officer: Pandora L. Wong
Regional Administrator: Armando Quiroz
San Francisco, California

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at

the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On January 24, 1996, the Employer, General Roofing Co., filed an application for labor certification to enable the Alien, Jose Raul Rodriguez, to fill the position of Roofer (AF 15). The job duties for the position, as stated on the application, are as follows:

> Remove and install new roof. Install all types of roof, composition shingles, tile and hot asphalt roof. Install plywood, nailing and cutting. Repair wood from roofs. Equipment used, skill saw, drill, kettle, blower and hand tools.

(AF 15). The only stated job requirement for the position is as follows: four years of experience in the job offered (AF 15).

In a Notice of Findings ("NOF") issued on September 13, 2000, the CO proposed to deny certification on the grounds that the Employer had rejected qualified U.S. applicants for other than lawful job-related reasons (AF 11-13).[1] The Employer submitted its rebuttal on or about October 11, 2000 (AF 7-9). The CO found the rebuttal unpersuasive, and issued a Final Determination, dated December 20, 2000, denying certification on the same basis (AF 4-6). Subsequently, the Employer appealed the Final Determination (AF 1-3), and the CO forwarded this matter to the Board of Alien

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[1]The CO should have cited 20 C.F.R. §656.21(b)(6) rather than §656.24(b)(2)(ii) as the controlling regulation hereunder. Nevertheless, we find that the CO placed the Employer on notice of the underlying deficiency and provided appropriate instructions to the Employer regarding the "Corrective Action" required to rebut the Notice of Findings (AF 12). Therefore, we find the CO's failure to specifically cite §656.21(b)(6) constituted harmless error.

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Discussion

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not reject U.S. applicants for subjective reasons which are either undocumented or unverifiable.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications are, therefore, a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the Notice of Findings, the CO challenged the Employer's rejection of various U.S. applicants, namely, Edward Hudspith, Javier Humberto Dominiguez, and Thomas Alfredo Cisneros. Furthermore, the CO directed the Employer to provide specific, job-related reasons for not hiring any of them (AF 12).

The Employer's rebuttal consisted of a letter by its President, Humberto Serrano, dated October 11, 2000 (AF 9). The full text of the Employer's rebuttal is as follows:

> In my business the stabulity (sic) of my employees is very important even if the employee has experience. Every company has their own way FP (sic) funtioning (sic), traning (sic) an employee has it (sic) costs and we cannot invest time on an employee which every year is changing from job to job. This is the case with Mr. Hudspith, in 5 years he has worked in 4 different jobs, even if he might have a lot of experience in the job requirement, but is not the kind of employee that our company needs.
>
> Mr. Domingues (sic) has had various jobs in 5 years, our objetive (sic) is when we hire an employee os (sic) for this employee to stay with our company for years to come. Also Mr. Domingues (sic) stated on his work application that he was xpecting (sic) a salary of $21.00 an hour and the prevailing wage for this job is $20.27 and hour and this is what was listed in the newspaper ad during the recruitment period. We cannot pay him the salary he expects.
>
> Applicant Mr. Cisneros has not (sic) experience in the job requirement. The job

required 4 years experience and this information was published in the newspaper during the recruitment period. Mr. Cisneros does not have the necessary experience that is required for the job.

For all the reasons mentioned above we belive (sic) that the applicants do not have the requirements to be considered condidates (sic) for the job offer.

(AF 9).

In the Final Determination, the CO found that the Employer failed to satisfactorily rebut the deficiencies cited in the NOF (AF 4-6). In pertinent part, the CO stated the following regarding each of the above-named U.S. applicants:

...The employer has stated that HUDSPITH was qualified and did not show that HUDSPITH was unwilling, unable or unavailable for this job at the time of the interview. Although an employer may reject a U.S. worker for factors that may adversely affect the applicant's ability to satisfactorily perform the job, i.e., bad work references, poor health, an employer can not reject U.S. workers due to personal situations or for factors which can only be determined from actual job performance. The employer has not shown that the reason HUDSPITH had four jobs in five years was due to poor job performance and not due to personal situations. The employer's rejection of this applicant citing lack of stability is a rejection based on supposition, speculation and conjecture and not on specific, valid reasons which address the applicant's willingness, ability, or availability.

...On his application, DOMINGUEZ indicated that he worked as a roofer with three employers from February 1991 thru June 19, 1997, the date on the application. Allowing for a three month period of unemployment from November 1994 to February 1995, DOMINGUEZ worked as a roofer for approximately 6 years. The employer required four years of experience. The rejection of DOMINGUEZ for having held "various jobs in 5 years" is not a valid reason for rejection of U.S. workers as explained in the above paragraph...(Regarding the suggestion that DOMINGUEZ would have rejected the job because he expected $21.00/hr., instead of the stated salary of $20.27/hr., the CO noted:)...That a qualified job applicant may expect a wage higher than the wage advertised does not specifically indicate that the applicant is unwilling to accept a lower wage should the job be offered. The employer did not state that he offered this job to DOMINGUEZ, a qualified U.S. worker, presenting the opportunity to DOMINGUEZ to reject the offer thereby demonstrating an unwillingness to work for the employer. The employer demonstrated the lack of good faith effort to hire the U.S. worker.

> The employer does not show with specificity why THOMAS ALFREDO CISNEROS is not qualified, willing, able or available for the job opportunity. CISNEROS was rejected because he lacked four years of experience as a roofer. CISNEROS provided a resume and a job application to the employer which specifically shows that he worked for four roofing companies from 1991 through the date of the application, June 16, 1997, a period of approximately 6 and a half years. CISNEROS did not indicate any periods of unemployment. The employer stated that "Mr. Cisneros does not have the necessary experience that is required for the job." On his resume, CISNEROS states that he has specific work experience performing the duties of the job as described by the employer in the newspaper advertisement and on te Application for Alien Employment Certification, Form 750A, Item 13, "Describe Fully the Job to be Performed." CISNEROS describes his position as "mop man" on his job application. Possessing the specific experience as described by the employer qualifies the U.S. worker for the job not the job title assigned to the employee while gaining the required experience. The mere statement of a general reason, "Mr. Cisneros has not (sic) experience in the job requirement," does not show with specificity why this U.S. worker was not qualified, willing, able or available for this job opportunity.
>
> As the employer did not satisfy the corrective action described in the Notice of Findings dated September 13, 2000, this Application for Alien Employment Certification is denied.

(AF 5-6).

In the Request for Review, the Employer essentially reiterated its rebuttal argument, as follows: 1. Despite Mr. Hudspith's extensive roofing experience, he "is not the kind of employee that our company needs," because of his 4 jobs in 5 years. 2. Mr. Dominguez also had various roofing jobs over a 5-year period. Furthermore, we cannot pay him the $21.00 per hour salary which he expects. 3. Mr. Cisneros has no experience in the job requirement (AF 1-2).

Having carefully reviewed the record, we find the Employer's stated reasons for rejecting the above-listed U.S. applicants are without merit. Our review of the resumes and/or applications of Messrs. Hudspith (AF 25-26), Dominguez (AF 21-23), and Cisneros (AF 38-42) reveals that all three U.S. workers meet the stated job requirement of four years experience in the job offered, notwithstanding the fact that Mr. Cisneros did not list "roofer" as the job title for his qualifying experience. In fact, the Employer concedes that Messrs. Hudspith and Dominguez meet the stated job requirement. As stated above, the Employer's only purported basis for rejecting Mr. Hudspith was his multiple jobs in a 5-year period. The essence of the Employer's position is its underlying assumption that, since Mr. Hudspith has changed jobs in the past, he will not stay in its employ over an extended period of time. However, it is well settled that an employer cannot make such a supposition. *See, Kem Medical Products Corp.*, 1991-INA-196 (June 30, 1992)(where employer unlawfully rejected a U.S.

worker because in its opinion "this potential employee would not commit to working for us beyond the next ad that appeared in the newspaper offering a better job."); *See also, Casey Spung Sys., Inc.*, 1991-INA-243 (July 2, 1993)(employer cannot merely assume that the applicant "will not stay in the job for a long period of time."). The Employer unlawfully rejected Mr. Dominguez on the same basis. Furthermore, the Employer improperly assumed that Mr. Dominguez would reject a wage of $20.27 per hour, because the U.S. applicant had wanted $21.00/hr. As stated by the CO, the Employer failed to establish that Mr. Dominguez rejected the job, because the Employer did not offer it. Finally, as stated above, despite the differing job titles, Mr. Cisneros' resume indicates that he has more than four years of experience in the stated job duties. Accordingly, he, too is qualified for the position. In view of the foregoing, we find that the Employer rejected qualified U.S. workers for other than lawful job-related reasons. Therefore, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.